Supreme Court, U.S.
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No.

In the Supreme Court of the United States

LJUPCO RISTOVSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Denial of Petitioner's Motion for New Trial as Untimely Based on the Time Limitation of Amended Rule 33 FRCrP, Effective December 1, 1998, Violative of the *Ex Post Facto* Clause of the Constitution?

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OPINION BELOW

The opinion of the United States Court of appeals for the Sixth Circuit is reported at 312 F3d 206 (6th Cir., 2002). A copy of the Opinion is included in the Appendix at Appendix A at 1a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming denial of Petitioner's Motion for New Trial was entered on December 4, 2002. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Opinion. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1) and §2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article I, Section 19

No Bill of Attainder or ex post facto Law shall be passed.

Attempt to Evade or defeat tax
26 USC §7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Fraud and false statements
26 USC §7206(1)

Any person who --

> (1) Declaration under penalties of perjury. --Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he doesnot believe to be true and correct as to every material matter; ...

shall be guilty of a felony, and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fraudulent returns, statements,
or other documents
26 USC §7207

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to

any material manner, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to subsection (b) of section 6047 or pursuant to subsection (d) of section 6104 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

Rules of procedure and evidence;
power to prescribe
28 USC §2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and court of appeals.

(b) Such rules shall not abridge, enlarge or modify and substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Federal Rules of Criminal Procedure
FRCrP 33 (1997)

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered,

take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Federal Rules of Criminal Procedure
FRCrP 33 (Amended December 1, 1998)

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may – on defendant's motion for new trial – vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Petitioner Ristovski was indicted by a grand jury in the Eastern District of Michigan on June 6, 1996 in a twelve-count indictment charging tax evasion (Counts 1 and 2) in violation of 26 USC §7201 in the years 1989 and 1990, filing false corporate tax returns in violation of 26 USC §7206(1) (Counts 3 and 4) in the same years, and making and submitting false documents to the Internal Revenue Service district office in Detroit, Michigan in violation of 26 USC §7207 in 1995 during the investigation preceding the indictment.(Counts 5-12). Trial took place from September 24, 1997 through October 14, 1997. On October 15, 1997, the jury found Petitioner Ristovski guilty on Counts 3-12 and reached no verdict on Counts 1 and 2.

Petitioner Ristovski was sentenced on June 24, 1998 to a term of 18 months custody on Counts 3 and 4 and 12 months custody on Counts 5-12, all to run concurrently, followed by a one year term of supervised release and a fine of $35,000. On April 18, 2000, the United States Court of Appeals for the Sixth Circuit affirmed Petitioner's convictions. 211 F3d 1271 (6th Cir., 2000) (unpublished). It denied a Petition for Rehearing and Rehearing En Banc on July 25, 2000. This Court denied a Petition for Writ of Certiorari on December 4, 2000. The United States Court of Appeals for the Sixth Circuit issued its mandate on December 11, 2000.

Petitioner filed a motion for a new trial on March 19, 2001. A hearing on the motion was held before the district court on May 23, 2001. No testimony was taken. The district court denied Petitioner's motion. The court concluded that it was without jurisdiction because the 1998 amendment to Rule 33 FRCrP required any motion for new trial to be filed within

3 years of the verdict and the motion was late. The court stated that if it had jurisdiction, it would deny the motion because the evidence was "newly available, but not new evidence" , and because the evidence is cumulative. The Court of Appeals affirmed on December 4, 2002, holding in a published opinion that the trial court correctly applied the time limit in the December 1, 1998 Amendment to Rule 33 FRCrP. The Court did not discuss the merits of the motion. United States v. Ristovski, 312 F3d 206 (6th Cir., 2002)

Petitioner Ristovski began Precision Steel Shearing (PSS) in 1984. The business sold its scrap metal to Mason Iron and Metal (Mason). As part of Mason's general practice, Mason paid for the PSS scrap with checks payable to cash. These cash checks totaled $92,542 in 1989 and $42,000 in 1990. The Government argued at trial that the checks were cashed by various people and that the cash was kept by Petitioner Ristovski instead of depositing it in the corporation's checking account. According to a government witness, the cash resulted in unreported income for 1989 and 1990.

It was part of Petitioner's defense that he did not sign the PSS tax returns with knowledge they were false. Trial evidence established that in 1989 Petitioner Ristovski was 29 years old, a native of Yugoslavia, and without any accounting experience or business education. Most of Petitioner's time at work was spent on the floor of the company working with metal shearing machinery; accounting matters were handled by the company bookkeeper and tax preparer.

The in-house bookkeeper was in her early twenties and had no prior accounting experience. The company's tax preparer, was ultimately sued by PSS resulting in a default judgment against him for failure to properly file PSS payroll

tax returns. The return preparer was subpoenaed by the Government as a trial witness; but he was arrested after failing to appear and eventually testified that because of a severe emotional problem, he could not recall the details of his work for PSS. Other trial witnesses testified the preparer told them that the cash from Mason checks need not have been reported as corporate income if used to buy corporate assets or for other corporate purposes.

Evidence at trial also established that some of the cash was used to pay corporate debts and some went to Petitioner Ristovski's parents to repay their loans to the company. There was testimony that cash from the checks was deposited into a joint account held by Petitioner Ristovski and his parents, and was later withdrawn to pay business expenses.

The newly discovered evidence proffered in Petitioner's New Trial Motion includes a company check register for the year 1989 and a small red bank style book containing records of essentially all payments by Mason to PSS in 1990, including checks payable to PSS and checks payable to cash. The 1989 check register contains entries for checks and deposits into the company checking account, and entries for both debits and credits to or from the savings account. Petitioner argued in his new trial motion that the 1989 check register represents a correlation of fund transfers between the company checking account and the personal savings account which Petitioner argued at trial had been used for company purposes; and that it demonstrates that substantially all of the Mason cash was accounted for in 1989 in records that were accessible to the tax preparer. Petitioner argued in his motion that the newly discovered evidence provides substantial factual support for his defense theory that he had a good faith belief there were business records covering all payments by Mason for PSS scrap; and supported

other evidence of his good faith basis to believe the gross income amounts on the company tax returns included those amounts. Petitioner argued in his motion that the documents had been taken from PSS by his father and kept at his father's house from about 1993 through the time period of the trial; and, that the documents were only discovered after the trial was completed. The motion argued that the newly discovered evidence provides independent support for his good faith defense and contradicts assertions made by prosecution witnesses that Petitioner knew the cash payments were not included in the company returns simply because the checks had been cashed instead of deposited directly into the company checking account.

ARGUMENT FOR GRANTING THE WRIT

I. The Denial of Petitioner's Motion for New Trial as Untimely Based on the Time Limitation of Amended Rule 33 FRCrP, Effective December 1, 1998, Is Violative of the *Ex Post Facto* Clause of the Constitution.

The trial court held it was without jurisdiction to hear Petitioner's Motion for New Trial because the Motion was untimely based on the December 1, 1998 amendment to Rule 33 FRCrP. The amended rule changed the triggering event for filing. It permits motions for new trial based on newly discovered evidence to be filed within three years of the verdict; the rule prior to amendment permitted motions to be filed within two years of the final judgment, interpreted as either the final decision of the court of appeals or its mandate. The Court of Appeals affirmed on the same grounds. Petitioner's Motion for New Trial was filed within approximately four months of the mandate, well within the two year time limit of Rule 33 FRCrP before the December

1, 1998 amendment; but, it was filed approximately four months after the time limit expired based on the amended Rule 33. The Court of Appeals affirmed. It concluded that application of the amended rule to Petitioner was "just and practicable" and not *ex post facto* because it permitted a window of 19 months measured from the effective date of the amendment until the date three years after Petitioner's October 15, 1997 verdict for Petitioner to file the motion.

The *ex post facto* prohibition forbids enactments which impose more punishment than prescribed at the time of the act. *Weaver v Graham*, 450 US 24, 28; 101 S Ct 960, 964; 67 LEd 2d 17 (1981). Two critical elements must be present for a law to be found to be *ex post facto*: "it must be retrospective, that is, it must apply to an offense occurring before its enactment and it must disadvantage the offender effected by it." *supra*. The *ex post facto* prohibition was intended to assure that laws "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 450 US at 25; 101 S Ct at 965; *Lynce v Mathis*, 519 US 433; 117 S Ct 891; 137 LEd 2d 63 (1997); *Miller v Florida*, 482 US 423, 430; 107 S Ct 2446, 2451; 96 LEd 2d 351 (1987). The principle of fair warning is an element of due process and a basis for the presumption against retroactive legislation.

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the

> "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal".

Landgraf v USI Film Products, 511 US 244, 265; 114 S Ct 1483, 1497; 128 LEd 2d 229 (1994).

The Court of Appeals found no ex post facto violation even though it concluded that "application of the time limitation in amended Rule 33 was retrospective because it changed the criminal review procedure for offenses occurring before the date of its enactment", *United States v Ristovski*, 312 F3d 206, 211 (6th Cir., 2002).[1] It did not expressly consider if the second element of the *Weaver* test, whether there was any disadvantage to the offender affected by the change; but, instead, it decided that the "amended Rule 33 merely changed the mode of procedure." 200 F3d at 213. According to the Court of appeals, the change in procedure did not deny Petitioner's substantive right to file a new trial motion because "he had ample time to bring his motion for new trial", 312 F3d at 212, that is, he had 19 months after Rule 33 was amended on December 1, 1998, until October 15, 2000 when the three year limit measured based on the amended rule from Petitioner's verdict, expired.[2]

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[1] In this case, the offenses were committed in 1990, 1991, and 1995.

[2] The order of this court dated April 24, 1998 giving notice of the effective date of the proposed change to Rule 33 along with Rules 5.1, 26.2, 31, 35, and 43 FRCrP states that the changes to the rules, including Rule 33 "shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending."

This Court has addressed the *ex post facto* prohibition as applied to ambiguous distinctions between substance and procedure in various contexts. *Dobbert v Florida*, 432 US 282; 97 S Ct 2290; 53 LEd 2d 344 (1977) (change in state death penalty procedures); *Collins v Youngblood*, 497 US 37; 110 S Ct 2715; 111 LEd 2d 30 (1990) (change in state criminal law concerning reformulation of verdicts); *Lynce v Mathis*, *supra* (state statute cancelled provisional early release credits); *Garner v Jones*, 529 US 244; 120 S Ct 1362; 146 LEd 2d 236 (2000) (change in frequency of state parole hearings); *Carmel v Texas*, 529 US 513; 120 S Ct 1620; 146 LEd 2d 577 (2000) (change in rule of evidence). However, this Court has not previously addressed the retroactive application of an amendment to the rule of criminal procedure which permits a criminal defendant's request for a new trial based on newly discovered evidence.

The opportunity for a defendant to file a motion for new trial provided for by Rule 33 FRCrP falls within the definition of protections historically afforded pursuant to the *ex post facto* prohibition.[3] 28 USC §2072, which grants this Court authority to prescribe rules of procedure for criminal

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[3] The types of criminal laws historically subject to the proscription against *ex post facto* laws include: "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action before. 2nd. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law next to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Carmel v Texas*, 529 US at 522 citing *Calder v Bull*, 3 Dall. 386, 390; 1 LEd 648 (1798) (Chase, G.)

cases provides that "such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

To the extent that the 1998 amendment to Rule 33 FRCrP is viewed as procedural, it is nevertheless still subject to *ex post facto* limitations. "A procedural change may constitute an *ex post facto* violation if it "affect(s) matters of substance, *Beazell, supra*, 269 US at 171; 46 S Ct at 69, by depriving a defendant of "substantive protections with which the law surrounds the person accused of crime." *Collins, supra* at 45, citing *Duncan v Missouri*, 152 US 377, 382-83; 14 S Ct 570, 571-572; 38 LEd 48 (1894).

> "We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural", a legislature does not thereby immunize it from scrutiny under the *ex post facto* clause. See *Gibson v Mississippi*, 162 US 565, 590; 16 S Ct 904, 910; 40 LEd 1075 (1896). Subtle *ex post facto* violations are no more permissible than overt ones. In *Beazell, supra,* we said that the constitutional prohibition is addressed to laws, "whatever their form," which make innocent acts criminal, alter the nature of the offense, or increase the punishment. *Id.*, 269 US at 170; 46 S Ct at 68-69. But the prohibition which may not be evaded is the one defined by the *Calder* categories. See *Duncan, supra*, 152 US at 382; 14 S Ct at 571; *Malloy, supra*, 237 US at 183-184; 35 S Ct at 508. The references to *Duncan* and *Malloy* to "substantial protection" and "personal rights"

> should not be read to adopt without explanation an undefined enlargement of the *ex post facto* clause."

Collins v Youngblood, 497 US at 42; 110 S Ct at 2719; 111 LEd 2d 30 (1990).

The time limit prescribed by Rule 33 FRCrP for filing a new trial motion based upon newly discovered evidence in effect at the time of Petitioner's trial and prior to December 1, 1998, measured the limit from final judgment. It required a new trial motion to be filed within two years of the final judgment. The mandate issued in Petitioner's first appeal on December 11, 2000. The two year time limitation in Rule 33 prior to amendment permitted his new trial motion to be filed until December, 2002. The amended Rule 33 effective December 1, 1998 measures the time period from the verdict and requires that a new trial motion "be made only within three years after the verdict or finding of guilty." The Advisory Committee note to the 1998 amendment explains that the use of a "final judgment" as the triggering event caused disparity because the two year period was measured by some courts from the date of the appellate court judgment and by others from the date of its mandate. However, based upon either approach, Petitioner's motion for new trial was well within the time limit of the old rule, measured either from the appellate court judgment or mandate. Retroactive application of the amended rule, terminating the time limit for filing a new trial motion two months before the mandate was issued and six months after the decision of the court of appeals on the first appeal, substantially disadvantaged the Petitioner.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to the question presented.

Respectfully Submitted,

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DATE: March 3, 2003.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

April 18, 2000, Filed

Nos. 98-1749/98-1868

UNITED STATES OF AMERICA,)
Plaintiff-Appellee, Cross-Appellant,)
)
v.)
)
LJUPCO RISTOVSKI,)
Defendant-Appellant, Cross-Appellee.)
)

JUDGES: Before: MERRITT, NELSON, and DAUGHTREY, Circuit Judges.

OPINION: DAVID A. NELSON, Circuit Judge.

Ljupco Ristovski was convicted on two felony counts of subscribing false corporate tax returns in violation of 26 U.S.C. §§ 7206(1) and eight misdemeanor counts of submitting false documents to the Internal Revenue Service in violation of 26 U.S.C. §§ 7207. Sentenced to concurrent terms of imprisonment, the longest of which was 18 months on the felony counts, he has appealed his convictions and sentences. The United States has cross-appealed, contending

that the district court erred in favor of Ristovski in its application of the sentencing guidelines.

We find no basis for reversing the convictions. We think there were probably errors on both sides of the ledger in the calculation of the defendant's sentencing range under the guidelines, but the errors cancelled one another out; the range actually used in sentencing was identical to what it would have been had there been no errors. Accordingly, we shall affirm both the convictions and the sentences.

I

Ristovski was the president of Precision Steel Shearing Company, a small business that cut steel to its customers' specifications. The steel-cutting process produced scrap that was sold to a company known as Mason Iron & Metal.

As a service to its customers, Mason would sometimes make advance payments for scrap that was to be delivered in the future. Mason was willing to make these advances in the form of checks made out to cash. Mason was also willing to break down advances of more than $10,000 into several smaller checks, thus making it possible to circumvent IRS reporting requirements for cash transactions of more than $10,000.

Through Ristovski, Precision arranged to receive numerous advances from Mason. Many were in the form of checks (or multiple checks) made payable to cash. Ristovski cashed a number of these checks himself, and he asked other employees or family members to cash the rest. Whoever cashed the checks generally returned the proceeds to Ristovski, but occasionally would be instructed to use some of the money to buy items for the business.

Precision's activities came to the attention of the IRS during an audit of Mason. After a preliminary investigation into Precision's records, the IRS began a formal audit of Precision. It soon became apparent that a sizable portion of the cash received via the Mason checks in 1988, 1989, and 1990 had not been accounted for as corporate income. Neither was the money included as income on Ristovski's personal tax returns.

As the audit was getting underway, a break-in and theft allegedly occurred at Precision's plant. Whether fortuitously or otherwise, most of the items that turned up missing were materials needed for the audit.

In the face of the loss of Precision's records, Ristovski contacted Chris Formosa, a mechanic who serviced the company's vehicles, and had him create replacement invoices to show what work Formosa had done for the company and what he had been paid. The recreated records, which were turned over to the IRS, were based for the most part on Formosa's memory, augmented with suggestions from Ristovski himself. The documents were clearly marked as replacements; there was no attempt to misrepresent them as original records.

Other documentation was available to show that some of the cash taken by Ristovski and members of his family had represented repayment of loans previously made by them to the company. Much of the cash from the Mason checks, however, could not be traced to any corporate use.

Precision's books were kept by Joan Penny, Ristovski's girlfriend at the time, who worked as the office secretary and had no prior bookkeeping experience. She knew

of the cash advances from Mason, and she claimed to have expressed concern about them to Ristovski.

The company's tax returns were prepared by John Golovich, an accountant. Golovich apparently had serious personal [*5] or psychological problems, as a result of which he disclaimed any recollection of the events at issue in the trial. Precision has since sued Golovich for malpractice and has recovered a default judgment against him.

In 1996, as an upshot of the IRS audit, Ristovski was indicted on 12 counts. Counts I and II of the indictment charged him with willfully attempting to evade personal income tax, in violation of 26 U.S.C. §§ 7201, by filing false individual tax returns for 1989 and 1990. Counts III and IV charged him with subscribing false corporate returns, a violation of 26 U.S.C. §§ 7206(1), for the same years. Counts V through XII charged him with submitting false documents (the Formosa replacement records) to the IRS on August 8, 1995, in violation of 26 U.S.C. §§ 7207.

After the case was tried and submitted to the jury, the court accepted a partial verdict when the jury reported that it had reached a unanimous decision on Counts III through XII. The verdict proved to be "guilty" on each of these counts. The jury then deliberated further on Counts I and II, but was eventually discharged because it could not reach [*6] a unanimous decision. Counts I and II were later dismissed.

At sentencing, the court overruled an objection by the government to a recommendation in the presentence investigation report that the tax loss from the false corporate returns not be aggregated, for purposes of applying the guidelines, with the tax loss from Ristovski's individual tax returns. The court also sustained an objection by Ristovski to

the criminal history category assigned him in the report; contrary to the recommendation of the probation officer who prepared the report, the court declined to give effect to two prior misdemeanor convictions on Ristovski's record, thereby placing him in Category I rather than Category II. Using the 1997 edition of the sentencing guidelines (an edition identical, in all relevant aspects, to the 1994 edition that was in effect at the time of the misdemeanor offenses charged in Counts V through XII), the court then imposed concurrent sentences of 18 months for Counts III and IV and 12 months for the remaining counts. Ristovski's appeal and the government's cross-appeal followed.

II

A. Sufficiency of the Evidence

1. Sufficiency of the Evidence as to Signing to False Returns

At the close of the evidence, Ristovski moved for a judgment of acquittal on the ground that the evidence was insufficient to support a conviction. The motion was denied.

Appellate review of the denial of such a motion is conducted *de novo*. See *United States v. Gibson*, 675 F.2d 825, 829 (6th Cir.), *cert. denied*, 459 U.S. 972, 74 L. Ed. 2d 285, 103 S. Ct. 305 (1982). The reviewing court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). This does not involve weighing the evidence or judging the credibility of witnesses. See *Gibson*, 675 F.2d at 829.

To prove a violation of 26 U.S.C. §§ 7206(1), the government must demonstrate that (1) the defendant willfully made and subscribed a tax return that was (2) signed under penalties of perjury and (3) the defendant did not believe the return to be true and correct as to every material matter. See *United States v. Bishop*, 412 U.S. 346, 350, 36 L. Ed. 2d 941, 93 S. Ct. 2008 (1973). Challenging the adequacy of the government's proofs with respect to the element of willfulness in signing and filing the false returns prepared by Golovich, Ristovski argues that he lacked formal education and that he conducted the financial aspects of his business -- freely mixing personal and business assets -- in accord with his "old world" background. (He had immigrated to the United States from Yugoslavia at the age of 9.) He also maintains that his management of the company focused on operations in the shop and that he remained largely ignorant of the company's finances. He naively trusted Penny and Golovich to keep accurate records, he says, and had no idea that anything was amiss when he signed the tax returns in question. The jury, obviously, disagreed.

For purposes of section 7206, willfulness has been defined as a "voluntary intentional violation of a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12, 50 L. Ed. 2d 12, 97 S. Ct. 22 (1976). The government is permitted to prove willfulness -- a state of mind that entails more than a careless disregard for the truth -- through the surrounding facts and circumstances. See *United States v. Barnes*, 313 F.2d 325, 327 (6th Cir. 1963). Facts and circumstances relevant in this connection include the extent of the defendant's knowledge about the income and revenues of the business and the role played by the defendant in the business operations. See *United States v. Mohney*, 949 F.2d 1397, 1406 (6th Cir. 1991), *cert. denied*, 504 U.S. 910, 118 L. Ed. 2d 546, 112 S. Ct. 1940 (1992).

In the case at bar the evidence did indicate that Ristovski spent a considerable amount of time in the shop. There was also ample evidence, however, that he took an active role in the financial affairs of the business as well. It was Ristovski who, working with a man named Michael Duerr of Mason Iron & Steel, made the arrangements for the advances and for the checks payable to cash. After the initial deal was made, Ristovski would often call Duerr seeking an advance and would instruct Duerr as to the amount he wanted on each check. Ristovski would either pick up the checks and cash them himself or would instruct someone else to do so. When others cashed the checks, they always returned the money to Ristovski or made purchases at Ristovski's instruction.

Ristovski claims that he arranged for checks payable to cash in order to prevent his father (who acted as corporate treasurer) from learning how Precision was spending the money. The father cashed some of the Mason checks, however, and turned the proceeds over to the son. The younger Ristovski had become a signatory on the corporate account in 1987, moreover -- before the arrangement with Mason was established -- and it was unnecessary for him to obtain his father's approval on corporate expenditures.

Defendant Ristovski's involvement in the financial aspects of the business is also evident from the fact that he kept track of how much money Precision owed to others and how much others owed Precision. He often asked Ms. Penny whether particular funds had been received or particular bills had been paid. Ristovski also orchestrated other financial transactions for the business, such as the purchase and refinancing of property. Further, there was evidence that both Penny and Golovich warned him of the danger of misusing the cash received from Mason.

The jury, in short, heard ample testimony to the effect that Ristovski played an active and sentient role in the financial operations of the business. Under the circumstances presented here, this was more than enough to sustain the denial of his motion for acquittal. See *Mohney*, 949 F.2d at 1406. The evidence did not have to exclude every reasonable hypothesis except that of guilt. See *United States v. Reed*, 821 F.2d 322, 325 (6th Cir. 1987).

2. Sufficiency of the Evidence as to Submitting False Documents

The misdemeanor charges against Ristovski for submitting false documents were based on the delivery to the IRS of the replacement invoices created by Chris Formosa.

A violation of 26 U.S.C. §§ 7207 occurs when a person willfully discloses to the IRS any documents that the person knows to be false as to any material matter. See 26 U.S.C. §§ 7207. See also *Sansone v. United States*, 380 U.S. 343, 13 L. Ed. 2d 882, 85 S. Ct. 1004 (1965).

Ristovski argues that the evidence did not show a violation of this section because he had a legitimate reason -- the alleged break-in and theft -- for giving the IRS replacement invoices; he informed the IRS of this reason; the documents clearly indicated that they were replacements rather than originals; and the IRS was not deceived. Furthermore, according to Ristovski, he did not give the documents to the IRS (his sister did), and he did not otherwise authorize their disclosure. Finally, Ristovski argues that the documents were not "material" inasmuch as the payment of cash for corporate expenses had nothing to do with the false corporate tax returns.

These arguments are not without flaws. Although the replacement invoices were given to the IRS agent by Ristovski's sister, for example, the jury was entitled to find that she was acting as his attorney at the time, just as it could find that Ristovski himself had instructed Formosa to create the new documents with a view to their delivery to the IRS. Moreover, Ristovski arranged for new documents to be created even where some original paperwork was available. (The original paperwork was later taken from Formosa in a drug raid.) Formosa -- who apparently owed Ristovski money at the time in question -- testified that the documents were reconstructed largely from memory, although he did rely to some extent on existing receipts for items he had bought for use in making repairs to Precision's vehicles. He admitted to simply making up some figures to suit Ristovski's needs, and he testified that the numbers given were merely guesstimates. The IRS, for its part, was unable to substantiate the payments reported in the replacement documents.

Given, as we have said, that our task is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," see *Jackson,* 443 U.S. at 319, we conclude that Ristovski's conviction for submission of false documents must be affirmed. The argument regarding materiality does not persuade us otherwise. Contrary to what Ristovski suggests, the documents need not have been relevant to the tax evasion. These documents probably had such relevance, in our view, but the law only requires that the falsities be material to the documents themselves. See 26 U.S.C. §§ 2707. Here the documents set forth amounts -- and perhaps entire transactions -- that were fictitious. This would certainly be material to any reconstructed invoice.

B. Lack of "Willfulness" Jury Instruction

Ristovski argues that the alleged insufficiency of the evidence as to his willfulness in subscribing the false corporate returns was exacerbated [*14] by the court's failure to give a requested jury instruction as to the meaning of "willfulness" in this context.

Refusal to give a jury instruction is reversible error if:

> "(1) the omitted instructions are a correct statement of the law; (2) the instruction is not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the requesting party's theory of the case. It is only when the instructions given, viewed as a whole, are misleading, that a reversal of judgment is warranted." *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 361 (6th Cir. 1997).

Although the trial court refused to give the requested instruction on willfulness with respect to the corporate tax returns, the court did instruct the jury that, as to all the counts, the "Government must prove beyond a reasonable doubt that the Defendant acted willfully. To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness." This differed from Ristovski's proposed instruction only in the last sentence, where Ristovski asked for this formulation: "Mere negligence, inadvertence, mistake, a careless disregard for the truth, or even gross negligence is not sufficient to constitute willfulness." We believe that the requested instruction was "substantially covered by other delivered charges," and the instructions as

given clearly applied to the corporate tax return counts. Viewed as a whole, the instructions were not misleading.

C. Multiplicity of Counts for Submission of False Documents

Ristovski maintains that the eight misdemeanor counts based on the submission of the recreated invoices were multiplicitous. An indictment offends the rule against multiplicity when it charges one criminal offense in several counts. See *United States v. Hart*, 70 F.3d 854, 859 (6th Cir. 1995), *cert. denied*, 517 U.S. 1127, 134 L. Ed. 2d 534, 116 S. Ct. 1368 (1996). Here the documents were all submitted to the IRS together, arguably giving rise to only one offense. But Ristovski did not raise the multiplicity issue prior to trial, and he thus waived any claim that the indictment should be dismissed on that ground. See *id.* 70 F.3d at 860 (citing Rule 12(b)(2), Fed. R. Crim. P.), and *United States v. Colbert*, 977 F.2d 203, 208 (6th Cir. 1992).

As far as sentencing is concerned, we note that Risotvski's 12-month sentences for the misdemeanors are to be served concurrently. This being so, it makes no practical difference whether the counts were multiplicitous or not. Furthermore, Ristovski raised this issue in a footnote only.

An argument raised in this manner merits little, if any, attention. See *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1058-59 (6th Cir.), *cert. denied*, 516 U.S. 912, 133 L. Ed. 2d 203, 116 S. Ct. 296 (1995).

D. Evidentiary Rulings

1. Evidence as to Money Received in 1988

Because he was not charged with tax evasion for 1988, Ristovski argues that the trial court erred in declining, as it did, to exclude evidence of the amount of money Precision received from Mason in 1988 in the form of checks payable to cash. Because the 1988 receipts were part of the same tax evasion scheme as that charged, however, the evidence was admissible as "intrinsic" to the charged conduct. The evidentiary rule on which Ristovski's relies -- Rule 404(b), Fed. R. Evid. -- need not be applied here. See *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995). And even under [*17] Rule 404(b), which was considered by the district court in denying Ristovski's motion *in limine* on this matter, the evidence was admissible to show willfulness. See *United States v. Ausmus*, 774 F.2d 722, 727-28 (6th Cir. 1985). In addition, an appropriate limiting instruction was given. We see no basis for a reversal on this point.

2. Information on Cash Transaction Reporting Requirement

Ristovski complains that the government should not have been allowed to introduce evidence that the IRS requires banks to file reports for cash transactions involving more than $10,000 and should not have been allowed to bring out the fact that Ristovski directed that checks totaling more than $10,000 be cashed at different bank branches. Again, however, this information was relevant under Rule 404(b) as indicative of willfulness.

3. Testimony by Joan Penny

Ristovski argues that Joan Penny should not have been allowed to testify that she told Ristovski to plead guilty and that he refused because the government would not offer him

less than a felony conviction. This testimony, he says, was gratuitous and vindictive.

A cautionary instruction was given, however, and Ms. Penny's testimony does not seem particularly damning in context. She had made it clear to Ristovski that she did not want to become involved in the litigation, and her testimony could easily be read to mean that she asked him to plead guilty in order to keep her out of the matter. Any error, we believe, was harmless.

Ms. Penny also testified that Ristovski was subject to a restraining order as a result of having threatened to kill everyone in Penny's house. No objection to this testimony was made, so it can be reviewed for plain error only. See *United States v. Kelly*, 204 F.3d 652, 2000 U.S. App. LEXIS 2696 (6th Cir. 2000). Given the context of the statement -- establishing the current extent of contact between Penny and Ristovski -- no plain error is evident. Moreover, the jury already knew that Penny and Ristovski were no longer on amiable terms and that Ristovski had a violent temper. Her testimony added little to the story.

4. Impeachment of Formosa by the Government

Ristovski complains that the court erred in allowing the government to impeach Chris Formosa, its own witness. This impeachment occurred when the government showed that Formosa has a conviction on his record, that he was interviewed by the IRS while in jail, and that belongings he kept in his employer's garage had been subject to a search by the Drug Enforcement Administration.

Any party is allowed to impeach a witness, even the party calling the witness. See Rule 607, Fed. R. Evid. Formosa's credibility was at issue because of his testimony regarding the validity of the replacement documents he created for Ristovski. In addition, his presence in jail, and the DEA raid, helped explain why he did not know where his original paperwork was at the time of trial. We reject this assignment of error.

E. Acceptance of Partial Jury Verdict

After more than six hours of deliberation, the jury informed the court that it had reached a unanimous verdict as to Counts III through XII. Defense counsel objected to the receipt of a partial verdict, urging that in further considering Counts I and II the jury might reconsider the other counts. The court nonetheless elected to receive the partial verdict. After deliberating further, the jury then asked the court this question: "Will our verdict on Counts III through XII stand if we are hung on [*20] Counts I and II?" Ristovski argues that this confirms that the jury did not understand the consequences of a partial verdict and might have reconsidered its decision as to Counts III through XII had it been able to.

Whether to accept a partial verdict is left to the sound discretion of the trial court. See *United States v. Benedict*, 95 F.3d 17, 19 (8th Cir. 1996). No abuse of that discretion is evident here, where the court gave the jury the option of continuing deliberations on all counts or proceeding with a partial verdict on the decided counts. The jury's subsequent note can reasonably be interpreted as seeking reassurance that being hung on two counts -- which would lead to a mistrial -- would not negate the verdict already rendered on the other counts.

There was no inconsistency, moreover, in finding the defendant guilty on Counts III through XII but not on Counts I and II. Further deliberations on Counts I and II did not necessarily require reconsideration of the other counts so as to make a partial verdict inappropriate. *Cf. Benedict*, 95 F.3d at 20.

F. Sentencing Issues

1. Use of the 1997 Guidelines

The presentence investigation report, which was largely followed by the district court in sentencing Ristovski, used the 1997 edition of the sentencing guidelines, the edition that was expected to be in effect at the time of sentencing. See 18 U.S.C. §§ 3553 and U.S.S.G. §§ 1B1.11(a). At the sentencing hearing the court observed that the 1994 edition was applicable to Ristovski, this having been the edition in effect in 1995 when the misdemeanors were committed. The court noted, however, that the 1997 edition was identical to the 1994 edition insofar as the relevant sections were concerned.

Ristovski argues that the 1991 edition of the guidelines should have been used, his felony convictions having been based on the subscription of tax returns for 1989 and 1990. These crimes occurred prior to 1993 guideline amendments that increased sentencing offense levels for corporate tax evasion. The increase, in Ristovski's case, came to two levels.

It seems to us that Ristovski's argument has considerable force, notwithstanding the "one book" rule embodied in U.S.S.G. §§ 1B1.11(b)(2) and notwithstanding the rule that in general requires the use of an amended edition of the guidelines when a defendant has been convicted of one

offense committed before the amendment and one committed afterwards. U.S.S.G. §§ 1B1.11(b)(3). See *Miller v. Florida*, 482 U.S. 423, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987), where the *Ex Post Facto* Clause of the United States Constitution was held to bar retrospective application of an amendment in a state sentencing scheme. The *Miller* amendment was one that substantially disadvantaged the defendant, whose crime had been committed before the amendment was adopted; the Court declined to let the amendment be applied notwithstanding that the state statute had from the beginning warned of future amendments.

Ordinarily, as explained in the Background section of the Commentary accompanying U.S.S.G. §§ 1B1.11 (1997 ed.), *ex post facto* considerations pose no bar to application of the guidelines as written (*i.e.*, to use an amended edition) in situations where, as here, at least one of a series of offenses was committed after the amendment had become effective. This is so, basically, because relevant conduct involving the earlier offense or offenses can properly be taken into account in fixing the punishment for the post-amendment offense or offenses. In the instant case, however, the post-amendment offenses were misdemeanors for which the maximum term of imprisonment authorized by statute -- 12 months -- was the sentence actually imposed by the court. Under these circumstances it is not readily apparent to us how the commission of misdemeanors after the 1993 amendment could properly be used to ratchet up the sentence for felonies committed before the amendment. For purposes of this appeal, in any event, we shall assume that Ristovski should have been sentenced under the 1991 edition of the guidelines.

2. Use as Relevant Conduct of Uncharged Violations Involving 1988 Returns

Ristovski takes issue with the district court's use of tax violations associated with the 1988 returns, which were not included in the indictment, in determining the tax loss under the sentencing guidelines. His complaint is not with the use of uncharged relevant conduct as such, see *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994), but with the use of the full amount ($105,000) received from Mason in 1988 in the form of checks payable to cash. Ristovski argues that he had no way to rebut this figure, the bank records from 1988 no longer being available. Citing *United States v. Silverman*, 976 F.2d 1502, 1506 (5th Cir. 1991), *cert. denied*, 507 U.S. 990, 123 L. Ed. 2d 159, 113 S. Ct. 1595 (1992), he contends that none of the $105,000 should have been included. At the very least, he asserts, $60,000 of the Mason advances was used to refinance Precision's real property, and this and other legitimate expenses should have been deducted from the $105,000.

We are not persuaded. It is clear from testimony throughout the trial that numerous records from 1988 were available. These showed that no deposits of the proceeds of Mason checks payable to cash were made to the corporate account or otherwise picked up as corporate income. As to the refinancing, the property in question was titled in the name of Ristovski's sister, not in the name of the company. After the refinancing, the company paid rent to the sister. The $60,000 thus cannot count as an expense for the business. Other items pointed to by Ristovski are not supported in the record either.

3. Failure to Aggregate Tax Loss from Personal Tax Evasion

The government argues here, as it did at the sentencing hearing, that the tax loss used to determine Ristovski's base offense level should have included both the loss from his

personal tax evasion ($55,384) -- a loss supported by a preponderance of the evidence, notwithstanding the absence of a conviction -- and the loss resulting from the false corporate tax returns ($33,062), for an aggregate loss of $88,446. This figure would have resulted in a base offense level of 12, under the 1991 guidelines, rather than 11.

The sentencing court refused to aggregate the losses. The court used only the $55,384,[1] expressing some concern that to do otherwise might constitute double counting, the same money not having been reported on either the personal or corporate returns. But in *United States v. Cseplo*, 42 F.3d 360 (6th Cir. 1994), a case with facts nearly identical to those presented here, we held that the personal tax loss and the corporate tax loss must be aggregated. See *Cseplo*, 42 F.3d at 364-65. That precedent is controlling in the instant case. The losses should have been aggregated, thereby raising the offense level by one.

4. Exclusion of Misdemeanors in Determining Criminal History Category

In determining Ristovski's criminal history category, the presentence investigation report counted two previous misdemeanor convictions. One was for assault and battery and the other for driving with a revoked license. The court sustained Ristovski's objection to the use of these convictions, thereby reducing his criminal history category from Category II to Category I.

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[1] For reasons not clear from the record, Ristovski was sentenced on the amount of tax loss from his personal tax evasion rather than the amount from the corporate tax evasion. He has not raised this issue on appeal.

In support of his objection, Ristovski argued that (1) there was inadequate documentation of the convictions; (2) there was no proof that Ristovski had been represented by counsel when he pleaded guilty; and (3) as to the revoked license offense, his sentence did not meet the requirements of U.S.S.G. §§ 4A1.2.

The district court sustained the objection on the ground that the government could not show that Ristovski had been represented by counsel. The Supreme Court, however, has stated that the burden of proof as to the presence of counsel is properly placed on the defendant. See *Parke v. Raley*, 506 U.S. 20, 30-31, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992). The district court should have presumed the validity of the convictions unless adequately rebutted by the defendant. See *United States v. McGlocklin*, 8 F.3d 1037, 1043 (6th Cir. 1993), *cert. denied*, 511 U.S. 1054, 128 L. Ed. 2d 341, 114 S. Ct. 1614 (1994). See also *United States v. Cordero*, 42 F.3d 697, 701 (1st Cir. 1994), *United States v. Ruo*, 943 F.2d 1274, 1276 (11th Cir. 1991), and *United States v. Gallman*, 907 F.2d 639, 643 (7th Cir.), *cert. denied*, 499 U.S. 908, 113 L. Ed. 2d 219, 111 S. Ct. 1110 (1991). Moreover, the probation officer testified that she verbally confirmed with the relevant state courts that their records indicated that Ristovski had been represented by counsel.

Ristovski's argument as to the lack of documentation has little merit. Although copies of the judgments were not provided, it is clear that Ristovski's counsel had paperwork regarding at least one of the convictions -- he referred to it when arguing about Ristovski's sentence in the driving-with-revoked-license incident. Furthermore, the probation officer testified that she verified the convictions and that the courts had microfiche records of the incidents.

As to Ristovski's final argument, U.S.S.G. §§ 4A1.2 provides that driving-with-revoked-license offenses are counted in a criminal history "only if (a) the sentence was a term of probation of at least 1 year or a term of imprisonment of at least 30 days. . . ." U.S.S.G. §§ 4A1.2(c)(1) (1991). The application note to this section explains that if a defendant receives a sentence that allows him to elect a fine or other non-incarcerative punishment as an alternative to incarceration, the sentence is deemed not to have entailed incarceration at all. See U.S.S.G. §§ 4A1.2(c)(1) comment. (n.4). In his objections to the presentence report, Ristovski argued that he received such an elective sentence and that the conviction should therefore not be counted.

This argument -- which essentially concedes the existence and validity of the conviction -- is incorrect as to the sentence's terms. It became evident at the sentencing hearing that the sentence for the licensing offense entailed a fine of $100, costs of $205, "*and* 30 Days or 60 Days in Macomb County Jail." (Emphasis added.) Ristovski was given 30 days' incarceration with release for work. His sentence thus qualified under §§ 4A1.2.

In sum, we conclude that the sentencing court should not have sustained Ristovski's objection on the ground it did. Ristovski's alternative arguments as to why the court's decision was correct have no merit. He should have been placed in Criminal History Category II.

Had this been done, and had the sentencing court used the 1991 guidelines and aggregated the tax losses, the guideline range for the felony counts would have been 18-24 months. This, as it happens, is precisely the range that was used. Accordingly, we see no need for a remand.

Both the convictions and the sentences are **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

September 12, 2002, Argued
December 4, 2002, Decided
December 4, 2002, Filed

No. 01-1747

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
LJUPCO RISTOVSKI,	)
Defendant-Appellant.	)
	)

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 96-80463. Bernard A. Friedman, District Judge.

DISPOSITION: Affirmed.

OPINION BY: Robert Holmes Bell

OPINION:

BELL, District Judge. Defendant-Appellant Ljupco Ristovski appeals the district court order denying his motion for new trial filed under Fed. R. Crim. P. 33.

Ristovski was convicted by a jury on October 15, 1997, of two counts of subscribing false corporate tax returns in violation of 26 U.S.C. §§ 7206(1) and eight counts of submitting false documents to the Internal Revenue Service in violation of 26 U.S.C. §§ 7207. Ristovski was sentenced on June 16, 1998, to 18 months imprisonment. His conviction and sentence were affirmed on April 18, 2000. *United States v. Ristovski*, 2000 U.S. App. LEXIS 7282, Nos. 98-1749 & 98-1868 (6th Cir. Apr. 18, 2000). His petition for writ of *certiorari* was denied on December 4, 2000, and the mandate was issued by the Court of Appeals on December 10, 2000.

On March 19, 2001, Ristovski filed a motion for new trial on the basis of newly discovered evidence. The district court, in an oral opinion, denied the motion for lack of jurisdiction because it was untimely. The district court noted that even if it did have jurisdiction, it would deny the motion on the merits because the evidence could have been discovered earlier and was cumulative. The written order denying Ristovski's motion for new trial was entered on June 4, 2001.

Motions for new trial are governed by Rule 33 of the Federal Rules of Criminal Procedure. Prior to December 1, 1998, Rule 33 required that motions for new trial based on newly discovered evidence be brought within two years after final judgment.[1] Ristovski's motion for new trial, which was

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[1] Prior to the December 1, 1998 amendments, Rule 33 read as follows:

The court on motion of a defendant may grant a

filed on March 19, 2001, would have been timely under the Rule 33 in effect at the time the offense was committed because it was filed within two years after final judgment. Amendments to Rule 33 were promulgated on April 24, 1998, and went into effect on December 1, 1998. Rule 33 as amended requires that motions for new trial based on newly discovered evidence be brought within three years after the verdict or finding of guilty.[2] The purpose of the amendments

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> new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1997).

[2] Rule 33, after the 1998 amendments, provides:

> On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may - on defendant's motion for new trial - vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the

to Rule 33 was to bring uniformity in the manner in which the time period for new trial motions based on newly discovered evidence was calculated.[3] Ristovski's motion for new trial is untimely under the amended Rule 33 because it was filed

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> verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33.

[3] The Advisory Committee explained that using the date of the "final judgment" as the triggering event caused disparity in the amount of time available for a defendant to file a motion for new trial in the event of an appeal because some courts measured the two-year period from the date of the appellate court's judgment and other courts from the date of its mandate:

> It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.
>
> Fed. R. Crim. P. 33 Advisory Committee Notes, 1998 Amendments. The time period for filing motions for new trial was expanded from two years to three years "to compensate for what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions." *Id.*

approximately five months after the three-year period measured from the date of his verdict.

Ristovski's first argument on appeal is that the district court's conclusion that his motion for new trial was untimely under Rule 33 as amended in 1998 violates the Ex Post Facto Clause of the United States Constitution.[4] The timeliness of Appellant's motion for new trial is a threshold question because if a motion for new trial is untimely, the court lacks jurisdiction to consider it on the merits. *United States v. Koehler*, 24 F.3d 867, 869 (6th Cir. 1994) (citing *United States v. Smith*, 331 U.S. 469, 475-76, 91 L. Ed. 1610, 67 S. Ct. 1330 (1947)). *See also United States v. Moreno*, 181 F.3d 206, 212 (2d Cir. 1999) (court lacks jurisdiction to consider untimely motion for new trial) (citing cases). Whether the district court's application of amended Rule 33 was a violation of the Ex Post Facto Clause is a legal question we review *de novo*. *See United States v. Futrell*, 209 F.3d 1286, 1289 (6th Cir. 2000) ("A defendant's claim that his or her sentence was imposed in violation of the ex post facto clause presents a question of law, and we review questions of law de novo" (quoting *United States v. Logal*, 106 F.3d 1547, 1550-51 (11th Cir. 1997))).

The Ex Post Facto Clause forbids Congress to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (footnote omitted) (quoting *Cummings v. Missouri*, 71

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[4] Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." U.S. Const., art. I, §§ 9, cl. 3; art. I, §§ 10, cl. 1.

U.S. (4 Wall.) 277, 325-26, 18 L. Ed. 356 (1867)). "Two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29 (footnote omitted). *See also Kellogg v. Shoemaker*, 46 F.3d 503, 509 (6th Cir. 1995). With respect to the first element, retrospective application, "the critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. "The focus in determining whether a new law violates the *ex post facto* clause is the time the offense was committed." *Kellogg*, 46 F.3d at 509 (citing *Weaver*, 450 U.S. at 31). In this case the offenses were committed in 1990, 1991, and 1997. Rule 33 was amended in December 1998. The district court's application of the time limitation in amended Rule 33 was retrospective because it changed the criminal review procedure for offenses occurring before the date of its enactment.

Retrospective application alone, however, is not enough to make out an ex post facto violation. The Ex Post Facto Clause does not guarantee that a criminal defendant's case will be governed in all respects by the law in force when the crime was committed. *Dobbert v. Florida*, 432 U.S. 282, 293, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977). "The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, *see Malloy v. South Carolina*, 237 U.S. 180, 183, 59 L. Ed. 905, 35 S. Ct. 507 (1915), and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert*, 432 U.S. at 293 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171, 70 L. Ed. 216, 46 S. Ct. 68 (1925)). Thus, no ex post facto violation occurs if a change does not alter "substantial personal rights," but

merely changes "modes of procedure which do not affect matters of substance." *Miller v. Florida*, 482 U.S. 423, 430, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987) (quoting *Dobbert*, 432 U.S. at 293). "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert*, 432 U.S. at 293. *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) ("While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case."). On the other hand, a change in the law that alters a substantial right can be ex post facto "even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12 (citing *Thompson v. Utah*, 170 U.S. 343, 354-55, 42 L. Ed. 1061, 18 S. Ct. 620 (1898); *Kring v. Missouri*, 107 U.S. 221, 232, 27 L. Ed. 506, 2 S. Ct. 443 (1882)).

The Supreme Court has recognized that the distinction between substance and procedure might sometimes prove elusive. *Miller*, 482 U.S. at 433. The general rule that has emerged from the case law, however, is that a change is procedural, and does not affect a substantial right if the change does "not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Weaver*, 450 U.S. at 31 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590, 28 L. Ed. 262, 4 S. Ct. 202 (1884)). Thus, in *Weaver* the Court found that Florida's revised good-time provision violated the Ex Post Facto Clause because it constricted an inmate's opportunity to earn early release, and thereby made "more onerous the punishment for crimes committed before its enactment." 450 U.S. at 35-36. In *Miller* the Court held that because a change in the sentencing guidelines after the offense was committed

increased the number of primary offense points assigned to sexual offenses by 20%, the change could not be deemed procedural because it "directly and adversely" affected the sentence the petitioner would receive. *Miller*, 482 U.S. at 433-35. In *Dobbert*, on the other hand, the Court rejected the petitioner's argument that changes in the Florida death penalty statute posed an ex post facto violation: "The change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." 432 U.S. at 293-94.[5] The *Dobbert* Court compared the case before it to *Hopt v. Utah*, 110 U.S. 574, 28 L. Ed. 262, 4 S. Ct. 202 (1884), in which the Court considered a change in the rules of evidence between the date of the offense and the date of the trial: "Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict." *Dobbert*, 432 U.S. at 293 (citing *Hopt*, 110 U.S. at 589).

We analyze Appellant's claim that the retroactive application of amended Rule 33 violated the Ex Post Facto Clause with these principles in mind.

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[5] Under the former procedure the imposition of the death penalty was presumed unless the jury made a recommendation for mercy. Under the new procedure there was a separate sentencing hearing where the defendant could present mitigating evidence. The jury would render an advisory verdict based upon its perception of aggravating and mitigating factors in the case, after which the Court would make the final sentencing determination. *Dobbert*, 432 U.S. at 294-95.

The question of whether the retroactive application of Rule 33 is substantive or procedural has not been widely addressed in the case law. The Ninth Circuit, in an unpublished decision, held that the 1998 amendments to Rule 33 resulted in a procedural change, not an increase in punishment, and that its application to a defendant who was convicted in 1994 did not constitute an ex post facto violation. *United States v. Tavizon*, 1 Fed. Appx. 722, 2001 WL 38416, at *4 (9th Cir. 2001).[6]

We are aware of only one case that has held the application of amended Rule 33 to constitute an ex post facto violation. In *United States v. West*, 103 F. Supp. 2d 1301 (N.D. Ala. 2000), the district court found that the change made in Rule 33 while the defendant's appeal was pending was a "substantive change" because it constituted "a very material alteration in the procedural rights of persons who claim to be entitled to a new trial because of newly discovered evidence." *Id.* at 1303. The court accordingly held that the retroactive application of the amended rule while a

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[6] This court, in an unpublished opinion, applied amended Rule 33 to bar a 1999 motion for new trial on a 1994 conviction that had become final in 1996. *United States v. Blue*, 2000 U.S. App. LEXIS 31043, No. 99-4131, 2000 WL 1800499 (6th Cir. Nov. 30, 2000). Because the motion would have been untimely under either the old or the amended Rule 33, it was unnecessary in *Blue* to consider the ex post facto implications of applying Rule 33 as amended. At least two other courts have similarly applied amended Rule 33 to cases where the verdicts were rendered before the effective date of the amendment, without discussion. *See United States v. Robinson*, 11 Fed. Appx. 709, 2001 WL 180559 (9th Cir. 2001); *United States v. Camacho*, 1999 U.S. Dist. LEXIS 18501, No. S12 94 CR. 313, 1999 WL 1084229 (S.D. N.Y. Dec. 1, 1999).

defendant's appeal was pending violated the ex post facto provision. *Id.*

It is significant that in *West* the defendant was sentenced in November 1995. Accordingly, if amended Rule 33 were applied to his case, his three-year period for filing a motion for new trial on the basis of newly discovered evidence would have expired before the amendments to Rule 33 even went into effect. The district court was appropriately concerned about the fairness of applying amended Rule 33 when to do so would eliminate the defendant's opportunity to file a motion for new trial. However, the court in *West* did not have to make its decision on constitutional ex post facto grounds. At the time the amendments to Rule 33 were promulgated, the Supreme Court specified that the amendments would apply to all pending criminal cases "insofar as just and practicable." Supreme Court Order 98-17, April 24, 1998. The *West* court could have avoided the constitutional issue by following *United States v. Jean*, 1999 U.S. Dist. LEXIS 6880, 1999 WL 301652 (N.D. Ill. Apr. 29, 1999), and holding that it would not be "just and practicable" to apply the amended Rule 33 to cases where the three years expired before the effective date of the amended rule.

Unlike the defendants in *West* and *Jean*, Ristovski's ability to file a motion for new trial on the basis of newly discovered evidence was not eliminated by the application of amended Rule 33. There was no denial of his substantive right to file a motion for new trial. The only effect of the amendment was to decrease the time frame in which he could file his motion. Ristovski was convicted on October 15, 1997. After Rule 33 was amended on December 1, 1998, Ristovski still had until October 15, 2000, more than nineteen months, to file a motion for new trial on the basis of newly discovered evidence. Because he had ample time to bring his motion for

new trial, application of Rule 33 to him was just and practicable. Application of the time limitation under amended Rule 33 merely changed the mode of procedure. It did not assign "more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred," *Weaver*, 450 U.S. at 31 n.13, nor did it affect matters of substance or alter substantial personal rights of the defendant. *See Miller*, 482 U.S. at 430. Like the Court in *Dobbert*, we find that the following language from *Hopt* summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

Dobbert, 432 U.S. at 294 (quoting *Hopt*, 110 U.S. at 589-90). Accordingly, we affirm the district court's application of Rule 33 as amended and its determination that Ristovski's motion for new trial was untimely.

Because we affirm the district court's determination that the motion for new trial was untimely, we need not address Ristovski's alternative arguments that the district court abused its discretion when it entered its alternative finding that Ristovski was not entitled to relief on the merits of his motion for new trial.

In summary, we **AFFIRM** the district court's denial of Defendant-Appellant Ristovski's motion for new trial.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

June 5, 2001, Filed

Criminal No. 96-80463
Hon. Bernard A. Friedman

UNITED STATES OF AMERICA,
Plaintiff,

v.

LJUPCO RISTOVSKI,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

On May 23, 2001, defendant Ljupco Ristovski's motion for new trial came before the court. A hearing was held and oral arguments heard. For the reasons stated on record,

IT IS ORDERED that defendant's motion for new trial is denied.

Dated: June 4, 2001

/s/_____
Bernard A. Friedman
United States District Judge

Copy Mailed This Date To:
Ross I. MacKenzie
Assistant U.S. Attorney
Harold Z. Gurewitz, Esq.